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NO.

in the

Supreme Court

of the

United States

OCTOBER TERM, 1988

FERNANDO DE IZAGUIRRE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FAILING TO GRANT THE PETITIONER'S MOTION FOR SEVERANCE DUE TO THE ANTAGONISTIC DEFENSE OF ENTRAPMENT AND ADMISSIONS TO THE CRIMES CHARGED ASSERTED BY A CO-DEFENDANT AND THE INTRODUCTION OF OTHER CRIMES EVIDENCE AGAINST THE SAME CO-DEFENDANT, WHICH CLEARLY DENIED THE PETITIONER'S FUNDAMENTAL RIGHT TO A FAIR TRIAL.

WHETHER THE EVIDENCE AT TRIAL WAS SUFFICIENT TO SUSTAIN THE PETITIONER'S CONVICTION FOR CONSPIRING TO DISTRIBUTE COCAINE IF THE EVIDENCE FAILED TO SHOW ANY AGREEMENT BETWEEN THE PETITIONER AND HIS CO-DEFENDANTS, FAILED TO SHOW THAT THE PETITIONER HAD KNOWLEDGE OF THE OBJECTIVES OF THE CONSPIRACY AND FAILED TO SHOW THAT THE PETITIONER KNOWINGLY JOINED THE CONSPIRACY.

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FERNANDO DE IZAGUIRRE,

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vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Petitioner, FERNANDO DE IZAGUIRRE, by his undersigned counsel, respectfully prays that a Writ

of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in the proceeding on June 10, 1988.

OPINION OF THE COURT BELOW

The decision of the Court of Appeals for the Eleventh Circuit is an unpublished (per curiam) opinion at *United States v. Fernando de Izaguirre*, Case No. 87-5681.

JURISDICTION

The judgment of the Court of Appeals affirming the judgment of the United States District Court was entered on June 10, 1988. A timely Petition for Rehearing was filed on June 24, 1988, and was denied on July 21, 1988. This petition is filed pursuant to Rule 20, Rules of the Supreme Court, as amended. The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The DEA began investigating the activities of David Basadre, one of the Petitioner's co-defendants, in July of 1986 (R8:83-84, 87). This investigation began nine months after confidential informant and main government witness Anthony Bordas was arrested for distribution of cocaine (R14:15-16). Bordas chose to assist the government in order to get a reduction of his sentence. Bordas was an admitted heroin and cocaine dealer who used legitimate businesses as "fronts" for his illegal activities (R6:74-77, 105-07; R7:72-77, 81-83; R9:32-33, 70-72), operated a credit card and stock scam

(R6:79-82; R935-38), violated probation by carrying a stolen weapon and stealing a car (R7:65-68, 72), and impersonated a federal drug agent (R6:83-89; R7:69-70, R8:178). Bordas also admitted drug use and testified that he had threatened a federal agent on at least two occasions (R8:185-87; R9:68-69).

Prior to July 30, 1986, Bordas had been to Miami on several occasions and had visited childhood friend, David Basadre (R14:7, 19-23). The two discussed cocaine and Bordas asked David if he could supply him with cocaine (R14:9, 20-23).

After Bordas was arrested, he worked with DEA Special Agent Brian Averi, and devised a plan to set up a fictitious "mob organization" that was looking for a big drug connection and supplier in Miami. Averi was introduced by Bordas to David Basadre as "Sonny Palermo" a lieutenant in the "mob."

Several recorded telephone conversations occurred between Bordas, David Basadre and Agent Averi, and between Bordas and David in an effort to set up a cocaine deal (R7:110, 161; R14: 24-35, 37-38). A meeting was arranged for August 3, 1986, between Agent Averi, David Basadre and Anthony Bordas at the Harts Inn in Secaucus, New Jersey (R7:161; R14:42). Bordas stated that David told them that his source for the cocaine was "blood." (R7:162; R14:43). David also told them that he had been "hustling" narcotics for Auto Sports & Design, a car dealership in Miami (R7:163-64; R14:43-44).

The next evening, the three met again at Marchi's Restaurant in New York City (R7:165-66; R8:89; R9:8;

R14:45-46). Special Agent Tom Pasquarello ("Tom Marino" in the "organization") was also present. Strategies were discussed, including methods of transportation and packaging, and firm plans were made for the initial cocaine transaction (R7:166-67, 169, 177; R14:46-47). David told Agent Averi that he was working with his older brother and would have to discuss the deal with him (R9:13; R14:47-48).

Between August 5, 1986, and September 31, 1986, a series of recorded and unrecorded conversations took place between Bordas and David, and Bordas, David and Agent Averi. During these numerous conversations, the three firmed up the one kilo cocaine deal (R7:17, 112-20, 170-73, 179-87; R8:89, 108-10; R14:49-51, 57-58, 60-63, 67-74; Government Exhibit 2, 4, 5, 25A, 36A and 37). It was decided that the transaction was to take place in Miami on October 1, 1986 (R14:50, 73-74).

Bordas arrived in Miami on September 30, 1986, and met with Agent Averi and David Basadre (R7:180-85; R14:75, 78). The parties had still not made firm arrangements for the one kilo deal, and Agent Averi admitted at trial that he was becoming frustrated with this deal and his case against David because of the constantly changing plans (R8:112-16). Because of these problems, the deal was postponed until October 2nd. The prosecutor again asked Bordas if David told him who his source was for this one kilogram of cocaine. At that point, Bordas testified that he could not recall, and the prosecutor showed him a copy of his written statement made on October 15, 1986, in which Bordas wrote that David had told him that the cocaine was coming from "Dinky's connection." (R14:81). Bordas testified that he

understood "Dinky" to be the Petitioner, Fernando de Izaguirre (R14:81).

On October 2nd, Bordas contacted Agent Averi and told him that David wanted to change the methods of payment, and demanded to be paid up front in full. Averi would not agree to this, and would only front the original $10,000 they had agreed upon. David met with Bordas and Special Agent Mark Averi (whose undercover role was that he was the brother of "Sonny Palermo"). Mark Averi handed David $10,000, and David told him that he had to go somewhere else to pick up the cocaine and left with Bordas. David drove his black Mazda pickup truck and Bordas drove a rental car to the Professional Concrete Pump Company, located at 6000 N.W. 77th Court in Miami, which is owned and operated by the Petitioner, Fernando de Izaguirre, and his father (R14:87-90). David was a childhood friend of the Petitioner and had spent time doing work and helping out at the pump company (R7:126-28; R11:66-67, 99).

Agents Mark Averi, Tom Slovenkay and Stephen Grille conducted surveillance of the area surrounding the entranceway of the pump company. The only vehicles the agents saw enter and leave the premises during their surveillance were the Mazda truck driven by David Basadre and the rental car driven by Anthony Bordas (R9:76, 95-96, 102-04; R10:6-11, 25-28, 34-35). However, Bordas testified that after he and David arrived at the company, he instructed Frank de Izaguirre, the Petitioner's brother, to call the Petitioner on the CB and find out when he would be arriving. Bordas testified that Fernando de Izaguirre arrived in

a two-tone blue and silver pickup truck (R14:90-91). Bordas first stated that Fernando de Izaguirre was *not* present when the cocaine was taken out of the storage room next to the company's office and tested, but then contradicted himself and testified that Fernando de Izaguirre was present (R14:90-95). He also testified that at that time, David gave Fernando $10,000 plus $3,000 (R14:95). However, despite the surveillance by DEA, there was no corroboration of Bordas' testimony regarding the Petitioner (R8:118-19; R14:93).

Bordas and David Basadre left the pump company approximately 30 minutes after they had arrived and were followed by agents to the Federal Express office, where the package was to be mailed (R14:96). Bordas contacted the DEA office in New York the next day to find out if the package had arrived.

On October 3, 1986, a meeting took place between Bordas, David Basadre and Special Agents, Mark Averi, Brian Averi, Tom Slovenkay and Mike Austin (R7:187). At that time, David Basadre received the $10,000 balance of payment (R7:187; R9:104-05, R14:106-07). Bordas testified that David called Fernando de Izaguirre on his beeper and soon thereafter, Fernando arrived to pick up David. Fernando was introduced to Agent Brian Averi as "Dinky" (R7:189; R9:105-06; R14:109). When Fernando arrived, all discussions between David Basadre, Agents Brian Averi and Mark Averi for a larger deal had stopped. David Basadre left with Fernando de Izaguirre.

Later that same day, David met with Bordas and Special Agents Brian Averi, Tom Slovenkay and Mike

Austin and they discussed future deals (R7:190; R14:110). David said that his future source for cocaine would be his brother (R7:191). Later that evening, David met with the agents and Bordas at "Club Mystique" and the meeting continued at "Sundays on the Bay" in Key Biscayne, Florida (R7:191-94; R9:110-11; R14:114).

On October 4, 1986, David Basadre and Anthony Bordas met at Frank Basadre's house. David and Frank spoke in private and David told Bordas that his brother had given him the "green light to do business with him" (R14:118). Later, David and Bordas met with Special Agents Austin and Mark and Brian Averi. Bordas testified at trial that David explained to Brian Averi that he had lied when he told him he had gotten the first kilogram of cocaine from his brother, and now explained that he really got it from somebody who knew Fernando de Izaguirre (R7:103; R8:15). David told everyone that he was now happy because he would be dealing with his brother (R7:18-20). These conversations were not recorded (R14:122-23).

On October 5, 1986, the Petitioner and his brother went with their friend, David Basadre, along with Anthony Bordas to "Sundays on the Bay." Bordas testified that he talked to the Petitioner about small ounce buyers in New York (R14:124). The Petitioner denied that such a conversation ever took place (R11:114). There was no corroboration that this conversation took place.

Conversations between David Basadre, Anthony Bordas and Brian and Mark Averi continued regarding their upcoming larger deal (R7:21, 147-49; R8:23;

R14:128; Government Exhibit 26, DEA No. N-24). Arrangements were made for David to meet the agents and Anthony Bordas in New York.

David arrived in New York on October 24, 1986, and was met by Anthony Bordas and Agents Brian Averi and Joseph Denehy. Conversations about future business were recorded (R7:104-05; R8:24-27; R14:136-37). A meeting took place at a condominium in lower Manhattan which was actually serving as the undercover DEA office. This meeting was video taped, and at this time, David was shown a $2 million "flash roll" by Agent Tom Pasquarello. Thereafter, the discussion about future business continued (R8:30, 34, 54; R9:15-19, 22; R14:138-41). David Basadre told Pasquarello that the first kilo came from "Dinky," but he did not mention Fernando de Izaguirre's name. Later that evening, David discussed his brother's organization and the future transactions that they were plannig (R8:30-36; R9:18-24; R14:142-43). David returned to Miami that same evening.

Telephone conversations continued between the parties, but none between the Petitioner and anybody involved in the negotiations (R6:2, 3-8, 12; R7:122-24; R8:37-38, 40; R14:149; Government Exhibits 27, 27A, 28, 28A and 29). Several taped conversations occurred between Bordas and David Basadre while David was working at the pump company. Again, the Petitioner's voice was not heard during any conversations in which the drug deals were discussed (R6:13-18, 20; R8:40-41; Government Exhibits 30, 31A). Throughout this time, David Basadre was arranging a 100 kilogram transaction with the undercover special agents (R6:26;

R9:114-19). Meetings continued in the Miami area between Bordas, David Basadre, Agents Brian and Mark Averi and Tom Slovenkay (R6:29; R7:52-53; R8:47-50, 131-33, 136; R9:77-78, 112-14, 120-24). Four meetings took place between David Basadre and Special Agents Brian Averi, Tom Slovenkay and Mark Averi for the 100 kilogram transaction (R6:33-36; R9:79-80). On November 21, 1986, David Basadre met with agents to finalize the deal which was set for the following day. However, the deal did not materialize on November 22nd (R6:38-43; R8:55-56; R9:83). Anthony Bordas also assisted in finalizing the transaction and was present with David Basadre during much of the negotiations. Throughout the negotiations, there were no conversations between any of the agents and Fernando de Izaguirre (R9:160; R10:12).

On November 24, 1986, David Basadre fronted Brian Averi two kilograms of cocaine for which he was owed $40,000. Conversations continued for the money owed (R6:54-55; R8:60-61). Bordas telephoned David and Frank Basadre and told them the $40,000 would be arriving on December 1, 1986. Arrangements were made the next day for Bordas to meet with David and Frank Basadre (R8:64, 68-69). Before this meeting, Bordas met with DEA agents and worked out the plan for agents to surveil the area where he was to meet the Basadres and then move in and arrest them (R9:134-36). The Petitioner was arrested at a later point in time at his company (R6:61-62; R10:5-6, 35-36).

Throughout the trial, counsel on behalf of co-defendant David Basadre asserted a defense of entrapment and admitted his client's guilt of the crimes

charged (R3:27; R12:31-52). Cross examination of informant Bordas by counsel on behalf of co-defendant David Basadre was clearly directed towards his defense of entrapment (R6:149, 156, 159-60, 168, 173-74, 181-85, 196, 202; R7:23-27, 33-34, 37-46; R8:75-76, 104, 164-66, 174-178, 190-94). The trial judge also gave the jury an entrapment instruction (R12:127-28). Despite repeated requests from counsel for the Petitioner, the trial judge denied all motions for severance due to the clearly antagonistic defenses asserted by him and by counsel for David Basadre (R10:48-49). Counsel for Petitioner also made *James* conspiracy objections and moved for a judgment of acquittal, which was denied by the trial judge (R10:49).

Numerous individuals testified on behalf of the Petitioner, including his parents, brothers, family friends, employees of the pump company and even the priest who married him (R10:53-103; R11:3-82). The Petitioner also testified on his own behalf (R11:84-120). He testified that at no time did he ever enter into a conspiracy with David Basadre, Frank Basadre, Anthony Bordas or anyone else to distribute or sell cocaine, nor was he involved in any scheme to distribute cocaine (R11:103-04). He did testify that he had been friends with David for quite some time, that David occasionally did some work for them at the pump company, and that he occasionally socialized and spent time with his friend, David Basadre. He also admitted that many times he would have to pick up and drive David to and from places since David had his driver's license revoked.

The Petitioner was charged in all counts of a three-count Indictment with conspiracy to distribute cocaine with co-defendants David Basadre and Francisco Basadre, and with distribution of cocaine on two occasions (R1:1). The jury acquitted the petition of the distribution counts, but returned a verdict of guilty on the conspiracy count (R13:3).

The Petitioner appealed his conviction (R3:132). On appeal, the appellate court affirmed the Petitioner's conviction by (per curiam) order.

REASONS FOR GRANTING THE PETITION

A.

THE APPELLATE COURT SANCTIONED A DEPARTURE BY THE TRIAL COURT FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, SINCE THE APPELLATE COURT FAILED TO REVERSE THE TRIAL COURT'S DENIAL OF THE PETITIONER'S MOTION FOR SEVERANCE DUE TO THE ANTAGONISTIC DEFENSE OF ENTRAPMENT ASSERTED BY A CO-DEFENDANT AND THE INTRODUCTION OF OTHER CRIMES EVIDENCE AGAINST THE SAME CO-DEFENDANT, WHICH CLEARLY AFFECTED THE PETITIONER'S FUNDAMENTAL RIGHT TO A FAIR TRIAL.

It is the duty of the appellate court to reverse a trial court's denial of a severance motion when it is clearly shown that the appellant was unable to receive a fair

trial and suffered compelling prejudice against which the trial court could not offer adequate protection. *See United States v. Magdaniel-Mora*, 746 F.2d 715, 718 (11th Cir. 1984). Although it is well established that persons who are joined together and jointly indicted generally should be tried together, *United States v. Esle*, 743 F.2d 1465, 1476 (11th Cir. 1984), especially in conspiracy cases, *United States v. Alvarez*, 755 F.2d 830, 857 (11th Cir.), *cert. denied*, ____ U.S. ____, 106 S.Ct. 274 (1985), there are instances where the defendant's right to a fair trial outweighs this general interest in judicial economy, and a severance becomes appropriate. *See United States v. Gonzalez*, 804 F.2d 691 (11th Cir. 1986) (clearly antagonistic defenses between parties mandated severance); *United States v. Figueroa*, 618 F.2d 934 (2d Cir. 1980) (severance required due to prejudice of introduction of other crimes evidence against co-defendants).

The law is clear that where a defense asserted by and on behalf of a co-defendant is irreconcilable and mutually exclusive to that asserted by and on behalf of another, separate trials are warranted and a severance is the appropriate remedy under such circumstances. *See United States v. Gonzalez; supra* at 695-96; *United States v. Romanello*, 726 F.2d 173 (5th Cir. 1984); *United States v. Johnson*, 478 F.2d 1129 (5th Cir. 1973). For the defenses to be irreconcilable and mutually exclusive, "the essence of one defendant's defense [must be] contradicted by a co-defendant's

defense." *United States v. Berkowitz*, 662 F.2d 1127 at 1134 (5th Cir. Unit B 1981)[1].

In *Berkowitz, supra*, the following standard was formulated:

> [T]he defense of a defendant reaches a level of antagonism (with respect to the defense of a co-defendant) that compels severance of that defendant, if the jury, in order to believe the core of testimony offered on behalf of that defendant, must necessarily disbelieve the testimony offered on behalf of his co-defendant . . . ultimately, the test is whether the defendant received a fair trial.

Where two defendants present defenses that are antagonistic at their core, a substantial hostility exists and . . . "the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty." *Berkowitz, supra* at 1134. If the essence of one defendant's defense is contradicted by a co-defendant's defense, then the latter defense can be said to "pre-empt" the former. *Berkowitz, supra* at 1134; *see also, United States v. Gonzalez, supra* at 695-96; *United States v. Romanello, supra* at 176; *United States v. Johnson, supra* at 1132-33.

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[1]In *Stein v. Reynolds Security, Inc.*, 667 F.2d 33 (11th Cir. 1982), the Eleventh circuit adopted as finding precedent all of the post-September 30, 1981, decisions of Unit B of the former Fifth Circuit.

The facts of the cases cited above are particularly compelling, since the appellate courts recognized the trial court's errors in failing to grant the requested severance, and recognized that situations do exist where the balancing of interests lies in favor of the defendant.

There is no doubt that counsel for the Petitioner Fernando de Izaguirre vehemently asserted at every opportunity that co-defendant David Basadre's defense of entrapment and admission of his guilt was irreconcilable and mutually exclusive to Fernando de Izaguirre's defense of complete innocence. By asserting the defense of entrapment, co-defendant David Basadre in fact admitted his guilt to the crimes charged, including the conspiracy charged in Count 1 of the Indictment. Co-defendant David Basadre's guilt was admitted at several points during the trial, and there was also evidence and testimony that David Basadre implicated the Petitioner, Fernando de Izaguirre in the same crimes for which he was admitting his own guilt. David Basadre allegedly admitted to others that the first kilogram of cocaine was supplied by the Petitioner, Fernando de Izaguirre, while the Petitioner asserted the exact opposite and maintained his innocence. Counsel on behalf of David Basadre stated over and over that his client committed the crimes alleged in the Indictment, but only because he was entrapped by law enforcement agents and the confidential informer to do so. For the jury to believe co-defendant David Basadre's entrapment defense, which required that he admit to the crimes charged, they would necessarily have to disbelieve the Petitioner's defense of innocence. Severance was the only appropriate remedy which would have cured the prejudice caused to the Petitioner

by this joint trial, and the appellate court improperly sanctioned the trial court's abuse of discretion in failing to follow what would be the accepted and proper judicial procedure of granting a severance under such circumstances.

Further, during the trial, there was a great deal of evidence and testimony regarding co-defendant David Basadre's prior illegal activity, which permitted the jury to infer co-defendant David Basadre's guilt of the crimes charged in the Indictment. In fact, the introduction of this "other crimes evidence" also affected the issue of the "irreconcilable and mutually exclusive" aspect of the defenses asserted by David Basadre and by the Petitioner, Fernando de Izaguirre. Since the jury was permitted to draw inferences regarding David Basadre's guilt of the crimes charged, they were equally permitted to draw the same inferences as to the Petitioner because of the conspiracy charge. Since no instruction to the jury could amply protect the Petitioner from the prejudice caused by the introduction of this other crimes evidence, a severance should have been granted. *See United States v. Figueroa*, 618 F.2d 934 at 945-56 (2d Cir. 1980).

B.

SINCE THE EVIDENCE AT TRIAL WAS CLEARLY INSUFFICIENT TO SUSTAIN THE PETITIONER'S CONVICTION FOR CONSPIRING TO DISTRIBUTE COCAINE BECAUSE OF A LACK OF SHOWING OF ANY AGREEMENT BETWEEN THE PETITIONER AND HIS CO-DEFENDANTS, THAT PETITIONER HAD KNOWLEDGE OF THE OBJECTIVES OF THE CONSPIRACY AND KNOWINGLY JOINED THE CONSPIRACY, THE APPELLATE COURT'S AFFIRMATION OF THE PETITIONER'S CONVICTION ALSO IMPROPERLY SANCTIONED A DEPARTURE BY THE TRIAL COURT FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEDURES.

A conspiracy conviction will be reversed if the evidence at trial is insufficient to establish that the defendant had entered into an agreement with the charged co-conspirators to accomplish an illegal purpose, that the defendant had knowledge of the conspiracy and with that knowledge knowingly and voluntarily joined the conspiracy. *See, e.g., United States v. Wexler*, 838 F.2d 881 (3d Cir. 1988); *United States v. Gardea-Carasco*, 830 F.2d 41 (5th Cir. 1987) *United States v. Penagos*, 823 F.2d 346 (9th Cir. 1987); *United States v. DeSimone*, 660 F.2d 532 (5th Cir. Unit B 1981); *United States v. Dyar*, 574 F.2d 1385 (6th Cir. 1978); *United States v. Duckett*, 550 FF.2d 1027 (5th Cir. 1977). Although a conspiracy can be proven by circumstantial evidence

alone, the circumstantial evidence must prove guilt beyond a reasonable doubt, and each element of the conspiracy must be supported by proof beyond a reasonable doubt. *See United States v. Penagos, supra; United States v. Russo*, 719 F.2d 545 (11th Cir. 1983); *United States v. Torres*, 705 F.2d 1287 (11th Cir. 1983). It is also clear that mere knowledge of a conspiracy in association with the conspirator is insufficient evidence to support a conspiracy conviction, *United States v. Vera*, 701 F.2d 1349 (11th Cir. 1983), and mere presence at the scene of a crime is also not sufficient to sustain a conspiracy conviction. *United States v. DiRe*, 332 U.S. 581 (1948); *United States v. Duckett, supra.*

In viewing the evidence and testimony presented at trial in a light most favorable to the government, the government's proof was clearly insufficient to establish that the Petitioner, Fernando de Izaguirre, was involved in a conspiracy or even had knowledge that a conspiracy existed to distribute cocaine. The only evidence adduced at trial of the Petitioner's alleged involvement came from informer Anthony Bordas, who testified that the Petitioner was present when the first kilogram of cocaine was packaged and prepared for shipping by Anthony Bordas and co-defendant David Basadre at the Petitioner's place of business on October 2, 1986. Anthony Bordas testified that after he and David Basadre arrived at the Petitioner's company, David contacted the Petitioner on the CB and asked when he would be arriving at the business. Bordas also testified that the Petitioner arrived at the pump company not long after they had arrived. This testimony was contradicted by the testimony of all surveilling agents, since none of them ever saw the Petitioner enter or leave

the pump company's premises at any time while Bordas and Basadre were there.

There was also testimony that co-defendant David Basadre told several agents that the first kilo of cocaine was provided by the Petitioner. Of course, there was no corroboration of this information, there was no testimony or evidence that the Petitioner ever handled any narcotics during the first kilo transaction, was ever involved in the negotiations for the sale, or even directly or indirectly participated in the packaging or distribution of the first kilogram of cocaine. In fact, there was testimony at trial that the first kilo of cocaine was supplied by Francisco Basadre, David Basadre's brother. Although there were many recorded conversations concerning narcotic dealings between the DEA and David Basadre and Anthony Bordas, there were no conversations between the Petitioner, de Izaguirre, about criminal activity or drug dealing, nor was the Petitioner's name ever mentioned during the many drug-related conversations.

There was also testimony that the Petitioner was present at the pump company on November 24, 1986, when the two kilogram transaction took place. Although he may have been present, there was no testimony or evidence that he knew that a narcotics transaction was taking place, was present in the office area where the transaction took place, or had any conversations with any of the alleged co-conspirators during the transaction.

In addition, the Petitioner presented a great deal of evidence on his own behalf, which lended convincing

support to his argument that the evidence was insufficient to sustain his conspiracy conviction. *See Darland v. United States*, 626 F.2d 1235 (5th Cir. 1980). Testimony of this type *alone* raises a reasonable doubt of the accused's guilt. *Edgington v. United States*, 164 U.S. 361 (1896).

It was error for the appellate court not to reverse the Petitioner's conspiracy conviction, since the evidence was insufficient to support it. By failing to reverse the conviction, the appellate court sanctioned a departure by the trial court from the usual course of judicial procedure in situations where the evidence is insufficient to sustain a defendant's conviction.

CONCLUSION

For the reasons stated, the Petitioner prays that this Court issue a Writ of Certiorari.

Respectfully submitted,

By /s/

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Appendix

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 87-5681

D.C. Docket No. 86-01024

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FERNANDO DE IZAGUIRRE,
DAVID BASADRE, FRANCISCO BASADRE,

Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Florida

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(June 10, 1988)

Before RONEY, FAY and COX, Circuit Judges.

PER CURIAM: AFFIRMED. See 11th Cir. Rule 36-1.